IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 376.

DUNBAR-STANLEY STUDIOS, INC., a Corporation,
Appellant,

versus

STATE OF ALABAMA,
Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT.

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ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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As we understand it, the State answers taxpayer's argument in this case by saying:

1. The tax here involved is not a "license".

Taxpayer's reply: We demur to this argument, and then take issue with it.

2. Taxpayer has misstated the Record in Brief by saying that Taxpayer "solicits" orders for baby pictures, for the Record shows that only Penney solicits such orders.

Taxpayer's reply: We also demur to this, and then take issue.

3. Taxpayer has sought to "prejudice" this case by noting a connection with the City case.

Taxpayer's reply: Demurrer and general issue.

4. The great majority of cases involving licenses on photographers have held they do not violate the Commerce Clause.

Taxpayer's reply: The facts are the exact opposite.

The State also makes vague assertions about:

1. The state court's construction of state taxes is binding, and

2. The license applying to all is not discriminatory.

The remainder of the State's Answer to our argument is too elusive for us to grasp.

To begin at the end and work backward, of course the state court identifies and applies the incidence of a state tax, and in the case at bar, it said that mere exposing film was the business of photography, and the license here applied to it. We have never said otherwise. The question in this Court is whether or not this violates the Commerce Clause.

The observation that this license is non-discriminatory completely overlooks the facts:

1. That taxpayer operates at a fixed location [Penney stores].

2. Because the film [not the photographer] goes out of State, the transient weekly license applies rather than the yearly license.

3. In this very case this construction of this license doubles the amount due for taxpayer's operations in Birmingham.

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This construction by the State Court of this license makes it discriminatory because of interstate activity. If the State has any answer to this, we have not discerned it.

I.

THE TAX HERE INVOLVED IS NOT A "LICENSE".

Of course, the nature of an involuntary exaction by a sovereign must be determined by its operation rather than by the particular descriptive language which may be applied to it.

> **Educational Films Corp. v. Ward**, 282 U. S. 379, 387 (1931).

Hence, it really does not matter what this tax is called.

It is perfectly clear that by the statutes of Alabama before one can engage in a business requiring a license, he must purchase such license.

> Tit. 51, Code of Ala., Sec. 831 (Appellant's Brief, pp. 4, 5).

The effect of the license is to confer on the licensee a personal privilege to engage in such business.

> Tit. 51, op. cit., Sec. 840 (Appellant's Brief, p. 4).

A transient photographer is required to obtain a license.

> Tit. 51, op. cit., Sec. 569 (Appellant's Brief, p. 2).

If this does not make the exaction sought of Taxpayer a license, we do not know what it does make of it. And regardless of what it is called, it is an admission fee charged before Taxpayer can engage in business in Alabama. If Taxpayer is engaged in interstate commerce (as we insist and the State does not deny), we arrive at precisely where we were when we called this a license, namely, may the State require an involuntary exaction of one before he can engage in interstate commerce?

II.

TAXPAYER HAS FALSELY REPRESENTED THAT IT SOLICITS INTERSTATE BUSINESS.

The actual facts here are

1. Penney decides when Taxpayer may come into the various stores. The cards introduced into evidence, but not reproduced in the Appendix, show this. It is a written record of visits.

But this does not mean that Taxpayer does not influence these dates. Taxpayer seldom sends more than one photographer at a time into the State. It has happened, but it is frowned on by Taxpayer. So when a photographer comes into the State, it is desirable that he or she cover the entire State before leaving.

Hence, the representation by Taxpayer, and the finding by the lower courts, that Penney chooses the time for visits is not false. But Taxpayer significantly influences the dates of these visits.

2. Taxpayer prepares direct mail advertising of visits. The lists used by Taxpayer belong to Taxpayer, and they are kept as current as possible. The mail is submitted to Penney for checking, as to deaths, departures, etc. The local managers of Penney are expected to check these lists. Actualy, they seldom do. Penney puts postage on the advertising and mails it.

Question: Who solicits those sales? Taxpayer or Penney?

3. Penney runs an advertisement in the local newspaper, a copy of which is in the Record in this case but not reproduced in the Appendix. It sets out dates of the visit. Its form and content were prepared by Taxpayer. As a

result of these efforts, customers come in and have pictures taken, and order prints.

Question: Who solicits those sales?

4. Taxpayer's photographers are instructed to come in, fill out order blanks, pose the children, take the pictures, return exposed film to Charlotte, and move on to the next town. These photographers claim to have, and evidence, special ability in handling children. No photographer has ever been prohibited from soliciting orders directly for photographs of children. Actually there are differences between the photographers as to their ability to get business. Since Taxpayer, Penney and the photographer are all compensated on a percentage basis, everyone is anxious to increase the volume of this business. However, these experts with children are not **required** to drum up the business they do. Their expertness runs along other lines. This is why an effort is made to make it as easy for them as possible with the pre-visit advertising done by Penney, even though the copy is furnished by Taxpayer.

It has been clear in this case from the very first day it began that the State would prevail if, but only if, Taxpayer's local activities were sufficient to license. The State has never claimed the right to tax Taxpayer's activities in North Carolina, or even all of Taxpayer's activities. The question has been as to taxing Taxpayer's activities in Alabama.

Obviously, the more local activities engaged in by Taxpayer, the more likely the State will win. Hence, it is apparent that the State will want to find more and more local activities on which to hang this tax. Taxpayer will want to have less and less local activity.

It has not been the purpose of Taxpayer to assist the State in winning this case. We have assumed that the State can take care of itself, and it has been completely

successful up to this time. However, when we commenced characterizing the facts set out above, we simply could not in good faith deny that in addition to exposing film in Alabama, Taxpayer might also have been thought to have solicited orders for sales. We took this as being on our part an admission against interest. It put even a more pronounced local activity into Taxpayer's actions than we had set out in our Bill of Complaint. We had thought that the State would emphasize our local activities, and even bring out these matters noted here, which have never been denied by Taxpayer.

Instead, and for reasons which have completely escaped us, the State has become adamant and intransigent in its insistence that Taxpayer has **not** solicited orders for sales of baby pictures in Alabama. We have never admitted this, for we know that some photographers have solicited orders, and it could be said that by furnishing advertising copy, this constituted solicitation. But we have not wanted to make an issue of this. We think it is to the State's advantage to saddle solicitation on Taxpayer, and not to our advantage to insist on it.

Interestingly enough, the Supreme Court of Alabama took what it understood to be the State's position in this matter and expressly found as a fact that the Taxpayer does not solicit. Even so, we could not represent to this Court that Taxpayer has never solicited orders for sales, for we know that it has, and the inference to be drawn from the other facts might be construed as Taxpayer action.

Now the State is upset in Brief because we stated the truth to this Court. Our response is, so be it. If the State, against its own interest, wants to estop us from stating the truth, we certainly should not object. Hence, the question will become whether or not a foreign photographer who solicits no orders but exposes film only for

processing across state lines may be licensed? We think not for the reasons set out in our Brief.

The addition of the solicitation will not, in our judgment, affect the result in this case. It may tend to further localize the activity. But the cases in our Brief show that solicitation of orders for sales across state lines may not be licensed.

See **West Point Grocery Co. v. Opelika**, 354 U. S. 390 (1957).

Hence, we think this is a tempest in a tea pot. We have represented the truth. The State is not satisfied with it. Under either alternative this license can't stand. Therefore, we will not take up more space on this.

III.

TAXPAYER WRONGFULLY ASSOCIATES THIS CASE WITH THE CITY CASE WHERE THE LICENSE WAS DISCRIMINATORY.

The facts here connect these two cases. Nothing we can do or say will separate or join them. Three years open operation in eight cities in Alabama by Taxpayer was not sufficient to catch the eye of the State. As soon as the City attacked Taxpayer, the State found Taxpayer. But the State was not satisfied with the current license. The State wanted to punish Taxpayer for not anticipating that the state courts would sustain this tax. The State cannot represent to this Court that it always imposes escape licenses where it finds taxpayers who have failed or refused to take out a license. But this was the treatment Taxpayer received in this case.

These facts speak more eloquently than we can. If this "prejudices" this case in this Court, it is the usual sort of prejudice which holds parties responsible for the consequences of their acts.

IV.

THE GREAT WEIGHT OF AUTHORITY HOLDS LICENSES SIMILAR TO THE ONE HERE NOT IN VIOLATION OF THE COMMERCE CLAUSE.

We argued this in the Jurisdictional Statement filed in this cause. To our surprise, the State now argues otherwise. The only cases cited by the State, and the only cases we have found sustaining a tax similar to the one in the case at bar, besides the Alabama cases, are

Lucas v. City of Charlotte, 86 F. 2d 394 (C. A. 4th, 1936);

Craig v. Mills, 203 Miss. 692, 33 So. 2d 801 (1948).

We do not believe that this puts three jurisdictions in this column. But regardless of this, the cases holding that this activity is interstate commerce and not subject to state licensing under the Commerce Clause are

Nicholson v. Forrest City, 216 Ark. 808, 228 S. W. 2d 53 (1950);

Olan Mills v. Tallahassee, 100 So. 2d 164 (Fla. 1958), cert. den. 359 U. S. 924;

Graves v. Gainesville, 78 Ga. App. 186, 51 S. E. 2d 58 (1958);

Bossert v. Okmulgee, 97 Okla. Crim. 140, 260 P. 2d 429 (1953);

Olan Mills v. Kingtree, 236 S. C. 535, 115 E. 2d 52 (1960);

Com. v. Olan Mills, 196 Va. 898, 86 S. E. 2d 58 (1958).

Taxpayer litigated over the New Mexico license as applied to Taxpayer's activities, which are the same as Taxpayer's activities in Alabama and throughout the country, in a three-judge federal district court in a case styled **Dunbar Stanley Studios v. Breen**, which was not reported, but is set out in the Appendix to the Jurisdictional Statement in this case.

We would say, using the State's terminology, that the "great majority of the cases" are contrary to the position of the Supreme Court of Alabama in this case.

Respectfully submitted,

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